

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SIDNEY R. WARD

Claimant

VS.

CIVIL AIR PATROL

Respondent

AND

OLD REPUBLIC INSURANCE CO.

Insurance Carrier

Docket No. 270,484

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the January 24, 2008, Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on June 3, 2008. Stephanie J. Wilson, of Lawrence, Kansas, appeared for claimant. Michael T. Halloran, of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant was entitled to a work disability of 50 percent. Further, the ALJ found that no additional evidence concerning temporary total disability benefits was entered and that he relied on the stipulation of the parties concerning the dates of payment and the compensation rate. Finally, the ALJ found that claimant is entitled to future medical care upon application for review and is entitled to unauthorized medical up to the applicable statutory limit.

The Board has considered the record and adopted the stipulations listed in the Award. However, the ALJ did not consider the deposition of Stuart Ford, and this is one of the issues listed in the Application for Review. Also not in the Award's recitation of the record were the transcripts of the Motion Hearing held June 2, 2003, the Penalties Hearing held March 25, 2002, and a preliminary hearing held November 5, 2001.

ISSUES

Respondent requests that the Board find that the ALJ erred in not considering the deposition of Stuart Ford taken on January 14, 2008, and contends that this matter should be remanded to the ALJ for a determination based upon the entire record. Respondent also argues that claimant is not entitled to a work disability since claimant was actively working after the accident. Further, respondent argues that claimant is not entitled to the full value of temporary total benefits paid because Dr. Jay Zwibelman concluded that claimant reached maximum medical improvement (MMI) on August 5, 2002, and because claimant began a business on November 13, 2003.

Claimant agrees that the deposition of Stuart Ford was taken within the respondent's terminal date and, therefore, is part of the record and should have been considered by the ALJ. Claimant further agrees that this matter should be remanded to the ALJ. Otherwise, claimant argues that he is entitled to an award based on work disability. He contends that although he engaged in work in a truck hauling business years after his accident, the business was not successful and he reported a loss on the business on his income tax returns. In the event the Board does not uphold the ALJ's award of work disability, claimant requests that the Board find Dr. Peter Bieri's rating opinion of 28 percent to the body as a whole to be the most credible. Claimant further argues that he was only paid temporary total disability benefits until he was released as being at MMI by his treating physician on August 18, 2005. Further, he asserts that the work he performed for Ward Hauling before that date did not amount to substantial and gainful employment.

The issues for the Board's review are:

(1) Should the ALJ have considered the deposition of Stuart Ford and, if so, should this case be remanded to the ALJ for a determination based upon the entire record?

(2) Is claimant entitled to an award based upon work disability? If not, what is claimant's functional disability?

(3) Is claimant entitled to the full amount of temporary total disability benefits paid by respondent?

FINDINGS OF FACT

1. On December 17, 2007, the ALJ entered an Order extending respondent's terminal date to January 15, 2008.

2. On January 14, 2008, respondent took the testimony of Stuart Ford by deposition.

3. The transcript of the Stuart Ford deposition was filed on February 21, 2008.

4. The ALJ's Award dated January 24, 2008, does not list the deposition of Stuart Ford as part of the record, and there is no mention of Mr. Ford's testimony anywhere in the Award.

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-523 states in part:

(a) The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality.

(b) Whenever a party files an application for hearing pursuant to K.S.A. 44-534 and amendments thereto, the matter shall be assigned to an administrative law judge for hearing and the administrative law judge shall set a terminal date to require the claimant to submit all evidence in support of the claimant's claim no later than 30 days after the first full hearing before the administrative law judge and to require the respondent to submit all evidence in support of the respondent's position no later than 30 days thereafter. An extension of the foregoing time limits shall be granted if all parties agree.

K.A.R. 51-3-8(d) states:

All parties shall be given reasonable opportunity to be heard. The testimony taken at the hearing shall be reported and transcribed. That testimony, together with documentary evidence introduced, shall be filed with the division of workers compensation, where the evidence shall become a permanent record. Any award or order made by the administrative law judge shall be set forth in writing, with copies mailed to the parties.

K.S.A. 44-555c(a) states in part:

There is hereby established the workers compensation board. The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

ANALYSIS AND CONCLUSION

The Board concludes that the Award was issued without consideration of the testimony of Stuart Ford or the exhibits offered at that deposition. Therefore, this matter

should be remanded to the ALJ for an award that is based upon his consideration of the entire record.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated January 24, 2008, is reversed and remanded.

IT IS SO ORDERED.

Dated this _____ day of June, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stephanie J. Wilson, Attorney for Claimant
 Michael T. Halloran, Attorney for Respondent and its Insurance Carrier
 Brad E. Avery, Administrative Law Judge